

December 10, 2017

VIA ELECTRONIC MAIL

Regional Freedom of Information Officer
U.S. EPA, Region 10
Office of Ecosystems, Tribal and Public Affairs
1200 6th Ave. ETPA-124
Seattle, WA 98101

Re: Freedom of Information Act Request: Use of the Pesticide Brodifacoum

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Animal Welfare Institute (“AWI”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, as well as fulfilling the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

AWI requests from the U.S. EPA, Region 10 Office of Ecosystems, Tribal and Public Affairs (“OETP”): All records mentioning, including, and/or referencing the use of Brodifacoum as a pesticide and rodenticide and the number of raptors killed as a result of Brodifacoum poisoning in each Oregon County, from January 1, 2007 to the date of this search.

For this request, the term “all records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

AWI is willing to receive records on a rolling basis.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." See 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any "portfolios" or "embedded files." Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or "batched," .PDF file. We appreciate the inclusion of an index.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 5 C.F.R. § 1303.10(c). Failure to comply within the statutory timeframe may result in AWI taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Tara Zuardo
Animal Welfare Institute
900 Pennsylvania Ave SE
Washington, DC 20003
tara@awionline.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as AWI access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. AWI Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

Thus, OETP must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(i)—(iv). As shown below, AWI meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of OETP. This request asks for: all records mentioning, including, and/or referencing the use of Brodifacoum as a pesticide and rodenticide and the number of raptors killed as a result of Brodifacoum poisoning in each Oregon county, from January 1, 2012 to the date of this search.

This FOIA will provide AWI and the public with crucial insight into OETP’s use of Brodifacoum in Oregon and the resulting deaths of raptors, including those which have been listed as “threatened” by the United States Fish and Wildlife Service. It is clear that lethal control of wildlife by a federal agency is a specific and identifiable activity of the government, in this case the executive branch agency, the OETP. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, AWI meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow AWI to convey to the public information about OETP’s use of the lethal poison in Oregon during the past five years. Once the information is made available, AWI will analyze it and present it to its 40,000 members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of OETP operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably-Broad Audience of Interested Persons’ Understanding of the Use of Brodifacoum as a Pesticide and Rodenticide

The requested records will contribute to public understanding of how OETP’s uses Brodifacoum

Activities of OETP generally, and specifically its use of Brodifacoum, are areas of interest to a reasonably broad segment of the public. AWI will use the information it obtains from the disclosed records to educate the public at large about OETP's killing of raptors with this lethal poisoning. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through AWI's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the use of Brodifacoum in Oregon and deaths of raptors that are not currently in the public domain – e.g., in the docket on regulations.gov. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested documents "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...".¹ Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of OETP's use of Brodifacoum in Oregon. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about how Brodifacoum is used in Oregon and how many raptors have been killed by OETP in Oregon during the past five years.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

AWI is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the use of Brodifacoum and the number of raptors killed by this lethal poisoning in Oregon since 2007, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public

¹ In this connection, it is immaterial whether any portion of AWI's request may currently be in the public domain because AWI requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about the use of Brodifacoum and deaths of raptors in Oregon.

Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, AWI meets this factor as well.

II. AWI has a Demonstrated Ability to Disseminate the Requested Information Broadly.

AWI is a non-profit organization that informs, educates, and counsels the public regarding animal and wildlife issues, policies, and laws relating to these issues. AWI has been substantially involved in the activities of numerous government agencies for over 66 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting AWI's fee waivers, agencies have recognized: (1) that the information requested by AWI contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that AWI possesses the expertise to explain the requested information to the public; (4) that AWI possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes AWI as an established expert in the field of imperiled species and impacts on protected species. AWI's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

AWI intends to use the records requested here similarly. AWI's work appears thousands of news stories online and in print, radio and TV per month, including regular reporting in important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on lethal control of wildlife utilizing information obtained by AWI from federal agencies. Every year, many people AWI's extensive website. AWI also sends out email newsletters and action alerts per year to more than 40,000 members and supporters. Four times a year, AWI sends printed newsletters to its members as well. Many people have "liked" AWI on Facebook, and there are regular postings regarding protection of wildlife. AWI also regularly tweets to followers on Twitter. AWI intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of OETP's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). AWI need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for AWI to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to AWI.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to AWI's role of educating the general public. Founded in 1951, AWI is a 501(c)(3) nonprofit conservation organization (EIN: 13-5655952) with more than 40,000 members and online activists dedicated to the protection of endangered and threatened species and wild places. AWI has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, AWI qualifies for a full fee waiver. We hope that OETP will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at (202) 446-2148 or tara@awionline.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Tara Zuardo
Wildlife Attorney
Animal Welfare Institute
900 Pennsylvania Ave SE
Washington, DC 20003
tara@awionline.org